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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

## No. 25.

THE CALIFORNIA REDUCTION COMPANY ET AL.,
PETITIONERS,

vs.

THE SANITARY REDUCTION WORKS OF SAN FRANCISCO, RESPONDENT.

## BRIEF ON BEHALF OF PETITIONERS.

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## STATEMENT OF THE CASE.

This case is here on a writ of certiorari to the United States circuit court of appeals for the ninth circuit.

The suit was commenced to enforce an ordinance of the city and county of San Francisco—the existence and validity of the ordinance being called into question—whereby there was granted to the assignor of respondent the *exclusive* privilege to receive and reduce by incineration, *for a period of fifty years*, all house refuse, butchers' offal, garbage, refuse, dirt, ashes, sludge, crockery, tins, cinders, bones, other like matter, dead animals, putrid vegetable matter, and fish, flesh, or food condemned by the board of health as

unfit for human food, found within the city and county of San Francisco.

By the terms of the ordinance (which is known as order No. 2965, and is fully set out in the record, beginning at the bottom of page 5 and again pages 324) all the substances named are required to "be forthwith delivered to the crematory therein provided for, and there, at the expense of the person or corporation so conveying the same, be cremated or destroyed," etc.

*The price required to be paid for the cremation or destruction of the substances named is twenty cents per cubic yard.*

The circuit court for the northern district of California obtained jurisdiction by reason of diversity of citizenship. The complainant was a California corporation. The California Reduction Company was a Colorado corporation, organized for the purpose of removing from San Francisco, by boats and barges, house refuse and garbage for destruction beyond the municipal limits. The other defendants, about 140 in number, are subjects of the King of Italy, and pursue the occupation of scavengers in San Francisco, "*and about half a dozen of them are shown to be householders in the city of San Francisco*" (Record, p. 410).

In its opinion upon an application for an injunction *pendente lite*, the circuit court upheld the ordinance in question, under an act of the legislature of California (Stats. Cal. 1893, p. 288) regulating the sale of franchises.

This act read as follows:

> "An act providing for the sale of railroad and other franchises in municipalities, and relative to granting of franchises (approved March 23, 1893).
>
> "The people of the State of California, represented in senate and assembly, do enact as follows:
>
> "SECTION 1. Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate railroads along or upon any public street or highway, or to exercise any other privilege whatever

hereafter proposed to be granted by the board of supervisors, common council, or other governing or legislative body of any county, city and county, city, town or district within this State, shall be granted upon the conditions in this act provided, and not otherwise. The fact that an application for such franchise or privilege has been made to such board of supervisors, common council, or other governing or legislative body, together with a statement that it is proposed to grant the same, must first be advertised in one or more daily newspapers of the county, city and county, city, town or district wherein the said franchise or privilege is to be exercised. Such advertisement must continue every day for at least ten days, and must commence at least thirty days before any further action of the board of supervisors, common council, or other governing or legislative body. The advertisement must state the character of the franchise or privilege proposed to be granted, the terms of its continuance, and, if a street railroad, the route to be traversed, and the day on which tenders will be received for the same. On the day so stated, the board, or other governing or legislative body herein mentioned, must meet in open session and read the tenders. The franchise or privileges must then be awarded to the highest bidder: *Provided, however*, That nothing in this section shall affect a special privilege granted for a shorter term than two years.

"SECTION 2. Any member of any board of supervisors, common council, or other governing or legislative body of any county, city and county, city, town or district of this State, who, by his vote, violates or attempts to violate the provisions of this act or any of them, shall be guilty of a misdemeanor and of malfeasance in office and be deprived of his office by the decree of a court of competent jurisdiction, after trial and conviction.

"SECTION 3. This act shall take effect immediately."

Subsequent to the granting of the preliminary injunction, issue was joined and the case tried. Judgment passed for

the complainants, and thereupon the respondents (petitioners here) prosecuted an appeal to the circuit court of appeals for the ninth circuit.

The petitioners here claimed in the circuit court of appeals that the ordinance was in no sense a franchise, but a mere monopoly of a hitherto common right, and if sustained at all, could only be sustained as a contract or a grant of monopoly under the police power.

In support of their position, that the ordinance in question was in no sense a franchise, the petitioners cited Bank of Augusta *vs.* Earle, 13 Peters, 595; People's Railroad *vs.* Memphis Railroad, 10 Wall., 51; California *vs.* Pacific Railroad Co., 127 U. S., 40.

They furthermore cited State *vs.* Green, 112 Ind., 462; 14 N. E., 352, in which it was decided that a physician's license is in no sense a franchise, although criminal for any person to exercise the calling of a physician without a license, and People *vs.* Matthews, 53 Ill. App., 305, wherein it was decided that the right to license the traffic in intoxicating liquors is found in the police power of the State, and that a license granted thereunder does not come within any definition of a franchise.

The circuit court of appeals did not uphold the ordinance as a franchise, but upheld it as a contract under the police power, leaving open, however, the question whether it could not also be upheld or maintained as a franchise.

The court said (Record, p. 420):

> "Inasmuch as we have arrived at the conclusion that the rights and privileges conferred by the board were constitutional and valid in the proper exercise of the police power of the State, and could be sustained as a contract, it seems to us unnecessary to further discuss the question whether it could also be upheld and maintained as a franchise."

In support of our application for a writ of *certiorari*, we relied upon, and we now rely upon, the following five propositions:

I. Considered either as a franchise or a contract under the police power, the ordinance here involved is a violation of the fourteenth amendment of the Constitution of the United States, for the reason that for a period of fifty years it deprives the householders of San Francisco of property of commercial value by transferring that property to the respondent, and this without requiring compensation to be made.

II. Conceding the ordinance here involved to be in all other respects constitutional and valid, it is nevertheless invalid for the reason that there is no authority of law whatever to sustain the provision therein contained which requires the householders of San Francisco to pay twenty cents per cubic yard for the reduction of the substances taken from them and given to the respondent by the ordinance here involved.

III. Considered either as a contract under the police power or as a franchise, the ordinance here involved never had any legal existence for the reason that it was never lawfully enacted.

IV. Considered as a franchise, the ordinance is invalid for want of power to grant the franchise and for a violation of the prescribed mode in the granting thereof, if there were power to grant the same.

V. Socialism has not become so dominant a principle in the police power that the State can assume or farm out a monopoly of all of the occupations subject to regulation under the police power.

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For a copy of the ordinance here involved (order No. 2965), see appendix, page 47.

## THE ARGUMENT.

### I.

CONSIDERED EITHER AS A FRANCHISE OR A CONTRACT UNDER THE POLICE POWER, THE ORDINANCE HERE INVOLVED IS A VIOLATION OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, FOR THE REASON THAT FOR A PERIOD OF FIFTY YEARS IT DEPRIVES THE HOUSEHOLDERS OF SAN FRANCISCO OF PROPERTY OF COMMERCIAL VALUE BY TRANSFERRING THAT PROPERTY TO THE RESPONDENT, AND THIS WITHOUT REQUIRING COMPENSATION TO BE MADE.

In the circuit court of appeals we claimed (Record, p. 413, pt. 13) that the ordinance here involved was "invalid because it deprives the owner thereof of property of commercial value without any necessity and without compensation."

This point is stated by the court as one of the propositions upon which we relied, but the proposition is nowhere considered in the opinion of the court.

We submit that the ordinance does deprive the householders of San Francisco of property without any compensation.

The ordinance makes it obligatory upon every inhabitant of the city and county of San Francisco to forthwith deliver to the complainant, for reduction and retention by it, all house refuse, butchers' offal, garbage, refuse, dirt, ashes, sludge, crockery, tins, cinders, bones, other like matter, dead animals, putrid vegetable matter, and fish, flesh, and food that may be condemned by the board of health as unfit for human food, and to pay twenty cents per cubic yard for the reduction of all of the enumerated substances.

There is no opportunity under this ordinance for any householder in San Francisco who may generate any of

these substances, and who is, therefore, the owner of them, to make any disposition of them whatever. He is required by the ordinance to deliver them to the complainant for reduction and retention, and he is forbidden (and among those who are so forbidden are the six petitioners who are householders in San Francisco) to convey any of these substances beyond the limits of the city and county of San Francisco.

It is therefore clear beyond discussion that for fifty years all property in the substances named is required to be surrendered by the inhabitants of San Francisco to the complainant.

Indeed, the obligation is not limited to the surrender, for by the terms of the ordinance the householder must pay twenty cents per cubic yard for the reduction of the property surrendered.

Nor can it be claimed that the articles required to be surrendered have no value whatever. It is shown in the proofs that a number of the substances mentioned are not only of value, but that they have a commercial value and are subjects of quotation in the daily fluctuating market reports, as, for instance, bones.* This is likewise true of broken crockery and tins. It is likewise true of house refuse as distinguished from garbage. It is decided in Alpers *vs.* San Francisco, 32 Fed., 506, that it is likewise true of dead animals.

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*The invalidity of the ordinance here in question, upon the ground that it involved the confiscation of property, was asserted by the petitioners in their answer to the bill of complaint (pages 34, 39, 56, 64, 65, 66). This point is made the subject of an assignment of error by petitioners (Record, pages 385, 386, 387, 388, 389, 390, 391, 402). The following witnesses gave testimony upon the subject: Behrend Joost (pages 100, 110, 122, 123, 124, 125, 126, 127, 136); M. D. Levenson (pages 137, 140, 141, 142, 143, 145, 147); L. R. Ellert (page 115); Luigi Ferrari (page 149); D. Picetti (page 160); Frederick Minatti (page 165); Frederick Boicello (page 172); Guiglermo Varno (page 183). See also Exhibit "A," Record, page 324, and Complainant's Exhibit "D," page 333.

Furthermore, it is expressly alleged in the bill of complaint that the substances mentioned in the ordinance "*are of value as articles of commerce.*"

The language is (Record, p. 18):

> "And your orator further shows unto your honors that *portions* of *all* of the garbage and other materials mentioned and described in said orders, ordinances and resolutions, *are of value as articles of commerce*, after being treated and reduced by your orator by processes both of reduction and incineration, which said articles of commerce when so reduced and incinerated, are and have been heretofore sold and disposed of by your orator at a profit, and in this way it has derived a revenue and is remunerated for a portion of the labor and expense incurred by it in incinerating and cremating the garbage and refuse matter, with which said articles of commerce are mixed and combined."

It will therefore be seen that it is an undisputed fact that the householders of San Francisco are required to surrender to the complainant all of the substances specified in the ordinance, *including portions thereof which are of value as articles of commerce.*

Nor is the value of this property so confiscated trifling in amount. On the contrary, the record shows that it has large value, which will obviously grow greater with the years. The complainant commenced business as a reduction company November 1, 1897. In the two months following its gross receipts amounted to $7,010.45 (Record, p. 15). This was equivalent to a gross annual income of $42,062.70. According to the testimony of the president of the complainant, the average amount of house refuse, &c., generated in San Francisco at the time he gave his testimony, which was in 1899, was 500 loads per day (Record, p. 113, Q. 24). Of this amount, according to the testimony of the president of the corporation, 250 loads per day were being diverted from the complainant (Record, p. 113, Q. 27). The diversion

involved a loss of *profits* of $2,000 a month (Record, p. 114, Q.'s 28 to 32). This testimony was given March 28, 1899 (Record, p. 96). During the year 1898 the gross receipts were $46,584.20 (Record, p. 332).

It is therefore evident that it cannot be claimed that the substances required to be delivered to the complainant are of inconsequential value and cannot be made the subject of commercial transactions or of profits in amounts which are of consequence. Under these circumstances we submit that the ordinance is a substantial violation of the fourteenth amendment.

In State *vs.* Robbins, 124 Ind., 308; 24 N. E., 978, there was involved the ordinance providing for the destruction of gaming devices. It is declared in the opinion that "unless, "therefore, the articles seized are of such a character that "the law will not recognize them as property, entitled as "such to its protection *under any circumstances*, they cannot "be summarily destroyed without affording the owner an "opportunity to be heard upon the subject of their lawful "use."

In a number of cases bearing very close analogy to the case at bar it is decided that ordinances like that here involved are unconstitutional because they involve a confiscation of property.

It is so decided in the following cases:

Meyer *vs.* Jones (Ky.), 49 S. W., 809 (1899).

Iler *vs.* Ross (Neb.), 90 N. W., 961; 57 L. R. A., 895 (1902).

River Rendering Co. *vs.* Behr, 77 Mo., 91; 46 Am. Rep., 6.

Knauer *vs.* City of Louisville, 45 S. W., 510 (Ky., 1898).

State *vs.* Morris, 47 La. Ann., 1664; 18 So., 710.

Underwood *vs.* Green, 42 N. Y., 140.

Schoen *vs.* The City of Atlanta, 97 Ga., 697; 25 S. E., 380.

Gregory *vs.* Mayor, 40 N. Y., 273.

In order that it may be made manifest that these cases decide the point to which they are cited, we have taken the following extracts from some of them:

Meyer *vs.* Jones:

> "A city ordinance providing for the removal of carcasses of dead animals, and fixing charges therefor, is void *unless it gives the owner of a dead animal the right to remove it or have it removed*, within a prescribed time before the public contractor takes charge thereof."

Iler *vs.* Ross:

> "Many other substances coming within the meaning of the language of the ordinance in the nature of *debris*, rubbish, and other waste material which might be specifically mentioned, *could probably be used for some beneficial purpose*, and many others having no utility like those referred to are not within themselves nuisances and a menace to the health of the public. *It is quite true their accumulation in unreasonable quantities and for an unreasonable length of time would render them nuisances, and to prevent which all reasonable regulations may be imposed.* * * *
>
> "*Not only is the owner's property taken from him when he could perhaps dispose of it* or make arrangements for its disposal to some advantage, *but he is compelled to bear the expense of the taking.* We cannot believe such an ordinance can be justified and upheld by the application of any sound principle of law."

In River Rendering Co. *vs.* Behr, 77 Mo., 91 (S. C., 46 Am. Rep., 6), an ordinance and franchise similar in principle to the one in the present case authorized the rendering company to remove and appropriate all carcasses of animals found in the city of St. Louis not slain for food, *without preserving to the owner any right to first dispose of the carcass.* The principle now contended for was recognized by the court in the following language:

> "The ordinance in question cannot be maintained as a police regulation. It can never be necessary to

take from one man his property and give it to another, until the property is in such condition that it is, or is so used that it is likely to become a nuisance; and even in the latter case, until it has become a nuisance, *an opportunity should be given the owner to change the use, or make such disposition of his property as will prevent the apprehended danger.* * * *

"By this ordinance, as construed by the two courts which have passed upon it, the property of A, in his dead hog, or bullock, is transferred to B, without the intervention of courts or juries, and with no formality whatever, except a notice from the police department of the city, that the hog or bullock is dead, and is to be found at a given place, which may be on the owner's premises in his own possession. The ordinance does not declare that all dead animals found in the city, not killed for human food, are nuisances, and if it did, such a provision could not be upheld. A dead hog, or steer or sheep is not *per se* a nuisance. It was so ruled by the New York court of appeals in Underwood *vs.* Green, 42 N. Y., 140. It was there observed that: 'A dead hog is not *per se* a nuisance, even though it died of suffocation, and is not necessarily dangerous to public health. The owner may still put it to a useful and innocent purpose.' While a dead animal is not *per se* a nuisance, it may become so, and the city, under her charter, may pass such ordinances as are necessary to prevent it from becoming a nuisance, *but she must in such legislation pay a proper regard to the rights of the owner of such property.*

"*The death of a domestic animal does not terminate the owner's property*, and while he may be required to make such use or disposition of the carcass as will prevent a nuisance, stench or other inconvenience to the neighborhood, the municipal authorities cannot arbitrarily deprive him of his property by giving it to another."

In Knauer *vs.* City of Louisville (Kentucky), 45 S. W. Rep., 510, a public contractor was, by ordinance, given the exclusive privilege of removing the carcasses of dead animals. The owner could direct the disposition of the carcass by

paying the public contractor certain fees, which fees were found to be practically prohibitory. The court says:

> "The sole question in this case is whether the city can pass an ordinance which fixes the fees to be paid to the public contractor for the removal of the carcasses of dead animals out of the city at such sums that their owners cannot pay them and realize anything out of them. Can the city in this indirect way confiscate the property of its owner and give it to the public contractor? Dead animals are not *per se* nuisances, and the owner's property rights do not cease at the death of the animal. Until such becomes a nuisance, the owner should have the right to realize whatever he can from it. Under the police power, the municipality certainly has the right and it is its duty to prevent carcasses of dead animals from becoming nuisances; *and to that end it may prescribe the manner of and the time in which the owners shall remove or permit them to be removed.* The employers of the appellant can remove the carcasses as speedily and in a manner that will cause as little offense to the public sense and taste as can the contractor. They can realize considerable sums by the sale of the carcasses by being permitted to make the removal. (After quoting from authorities.) It requires no argument to show that neither a municipal or other government can take one man's property and give it to another. * * * The effect of an ordinance which does not allow the owner of a dead carcass to remove it, but requires him to pay a fee for its removal which is greater than its value, is precisely the same in effect as an ordinance which takes the carcass from one person and gives it to another."

In State *vs.* Morris, 47 La. Ann., 1664, the court, passing upon a similar ordinance, say:

> "We rest the case entirely on the ground that the owner is entitled to a reasonable time after the death of an animal to dispose of it or cart it away under the requirements of existing ordinances. The situation and the climate may render it necessary to permit very little time and opportunity for removal. In

adopting ordinances which must necessarily be general the owner may be allowed but little time (if public safety requires) for the removal of his dead animals. The authorities agree that the removal must be made as ordained, and that the courts cannot contest the manner in which it shall be done and under what sanitary condition, if reasonable. *However limited may be the right of removal it cannot be denied entirely without conflicting with the laws regulating police power.*"

Upon the foregoing authorities we submit that the ordinance here involved does violate the constitutional provision which declares that property shall not be taken without compensation.

## II.

CONCEDING THE ORDINANCE HERE INVOLVED TO BE IN ALL OTHER RESPECTS CONSTITUTIONAL AND VALID, IT IS NEVERTHELESS INVALID FOR THE REASON THAT THERE IS NO AUTHORITY OF LAW WHATEVER TO SUSTAIN THE PROVISION THEREIN CONTAINED WHICH REQUIRES THE HOUSEHOLDERS OF SAN FRANCISCO TO PAY TWENTY CENTS PER CUBIC YARD FOR THE REDUCTION OF THE SUBSTANCES TAKEN FROM THEM AND GIVEN TO THE RESPONDENT BY THE ORDINANCE HERE INVOLVED.

In the circuit court of appeals we argued (Record, p. 412, pt. 7) "that there is no authority of law for the imposition of the compulsory payment of twenty cents a cubic yard upon the householders of the city and county of San Francisco."

Although it is stated in the opinion of the circuit court of appeals that this point is made by us, the proposition is nowhere considered by it.

There is no law upon this subject peculiar to California. In other words, there is no law in the State of California which in terms or by necessary or other implication author-

ized any municipal corporation to impose such a burden as that involved in the charge of twenty cents a cubic yard for the reduction of the substances mentioned. It is true that constitutional and statutory provisions exist in California, whereby there is conferred upon the municipalities of that State the usual powers of local police. If such powers of local police, which have been granted to nearly all of the municipalities of the country, carry by necessary implication power to impose a charge like that here involved, then such power exists; otherwise the power is entirely wanting.

As already stated, there is no legislation in California directly covering the matter here involved, and if it exists at all it must arise out of the power granted in general terms to legislate with respect to matters of local police. In that event such power has been conferred upon and inheres in practically every municipal corporation in the country.

We submit that no such power exists as an incident to the grant of the powers of ordinary local police, and that therefore there is no law in California which authorized or authorizes such a provision.

The Slaughter-house case (16 Wall., 36) is not authority for the imposition of the charge. The law-making power in that case was the sovereign law-making authority of the State of Louisiana, while here we have a mere municipal corporation, which has only such authority as is delegated to it by a sovereign law-making power.

There is not a single reported case which sustains the exercise by municipal authorities of such a power. There was one case cited to the point in the courts below, namely, Walker *vs.* Jamieson, 140 Ind., 591; 37 N. E., 402; 39 N. E., 869; 28 L. R. A., 679; 49 Am. S. Rep., 222. In that case, however, in answer to a petition for a rehearing, the portion of the decision which affirmed a provision imposing a charge somewhat similar to that here involved *was expressly withdrawn.*

## III.

CONSIDERED EITHER AS A CONTRACT UNDER THE POLICE POWER OR AS A FRANCHISE, THE ORDINANCE HERE INVOLVED NEVER HAD ANY LEGAL EXISTENCE, FOR THE REASON THAT IT WAS NEVER LAWFULLY ENACTED.

The ordinance here involved was attacked upon the ground that it had never been passed for the reason that it had never received the signature of the mayor of San Francisco (Record, pp. 49, 97).

The circuit court decided that the ordinance did not require the signature of the mayor for the reason that it was the grant of a franchise under the franchise act of 1893 (Stats. Cal. 1893, p. 288).

The circuit court of appeals, as already shown, put its decision upon the ground that the ordinance was a contract under the police power and did not undertake to decide whether it was a franchise or not.

The circuit court of appeals, however, decided that the ordinance did not require the signature of the mayor for reasons presently to be mentioned.

We now proceed to show that, whether it be a contract under the police power or a franchise under the act of 1893, the ordinance failed of passage for the reason that it never received the signature of the mayor.

(a.) Considered as a contract under the police power, the ordinance required the signature of the mayor after having been passed in accordance with section 68 of the act consolidating the city of San Francisco and the county of San Francisco (Stats. Cal. 1856, p. 164).

Section 68, in so far as it applies to the question here involved, reads as follows:

> "Every ordinance or resolution of the board of supervisors, providing for any specific improvement,

the granting of any privilege, or involving the lease, or other appropriation of public property, or the expenditure of public moneys (except for sums less than five hundred dollars), or laying tax or assessment, and every ordinance or resolution, imposing a new duty or penalty shall, after its introduction in the board, be published, with the ayes and nays, in some city daily newspaper, at least five successive days, before final action by the board upon the same; and every such ordinance, after the same shall pass the board shall, before it takes effect, be presented to the president of the board for his approval. If he approves, he shall sign it; if not, he shall return it, within ten days, to the board, with his objections, in writing. The board shall then enter the objections on the journals, and publish them in some city newspaper. If at any stated meeting thereafter, two-thirds of all the members elected to the board, vote for such ordinance or resolution, it shall then, despite the objections of the president, become valid. Should any such ordinance or resolution not be returned by the president, within ten days after he receives it, it shall become valid the same as if it had received his signature."

It will be noted that under section 68 the approval of the mayor is required to

(*a.*) Every ordinance *or resolution* of the board of supervisors providing for * * * the granting of any privileg;

(*b.*) Every ordinance *or resolution* * * * laying tax or assessment;

(*c.*) Every ordinance *or resolution* imposing a new duty;

(*d.*) Every ordinance *or resolution* imposing a * * * penalty.

We claim that order No. 2965 comes within three of the four clauses above specified, because:

(a.) Order No. 2965 provides for the granting of the privilege of incinerating garbage and charging twenty cents a cubic yard therefor;

(c.) Order No. 2965 imposes a new duty, namely, a compulsory charge of twenty cents a cubic yard upon all of the producers of garbage in San Francisco during a period of fifty years, and section 4 requires garbage to be delivered to the holder of the franchise.

(d.) Any violation of sections 3 and 4 of the ordinance is made a misdemeanor by section 12 thereof.

Bearing this in mind, we proceed to give the history of the proceedings taken by the board of supervisors in regard to the alleged passage of order No. 2965, the franchise or contract here involved:

November 8, 1895, A. M. Skelly applied to the board of supervisors for a franchise to cremate garbage (Record, p. 370).

November 15 the committee on health and police submitted to the board a proposed form of order for a franchise (Record, p. 371).

November 18, 1895, the board of supervisors passed a resolution numbered resolution No. 13231 (3d series), wherein the clerk of the board was directed to advertise for proposals for the sale of a franchise "conferring the rights "and privileges as specified in and under the provision of "the following *proposed* order" (Record, pp. 345–350).

November 26, 1895, the clerk of the board of supervisors published his notice for the sale of said franchise inviting sealed proposals which were to be opened January 6, 1896 (Record p, 356).

January 6, 1896, three bids were received from L. V. Merle, F. E. Sharon, and A. M. Skelly (Record, pp. 357-358).

January 6, 1896, the proposals were referred to the committee on health and police (Record, p. 637).

February 3, 1896, the committee reported in favor of awarding the franchise to L. V. Merle (Record, p. 359).

February 17, 1896, the *proposed* order set forth in resolution No. 13,231 and in the advertisement of the clerk soliciting sealed proposals was given the number order No. 2965, certain blanks therein were filled in and it was taken up and passed. Eight supervisors voted in favor of the order, and four supervisors against the same (Record, pp. 359-365).

It will be seen from the foregoing statement and an examination of the record that the board of supervisors always contemplated that action legislative in character was required to be taken by the board after the highest bidder had been ascertained. The board of supervisors plainly contemplated that what it tendered to the public and what it invited sealed proposals upon was a *proposed* order. In other words, the board of supervisors, in effect, stated to the public, "if you will bid upon this proposed order we will pass "an order after the bidding has occurred and the highest "bidder has been ascertained, whereby a grant of the specified franchise will be made to that highest bidder." The entire proceedings were based upon that idea. Why the idea was not followed out it is impossible to say. It does appear, however, that a sufficient number of supervisors voted against order No. 2965 to render its adoption impossible if the mayor were opposed thereto.

The vote upon order No. 2965 was eight supervisors favoring it and four opposing it. The consolidation act (Stats. Cal., 1856, p. 164) provided eight supervisors could override a veto by the mayor. The number, however, was changed to nine in 1868 (Stats. Cal., 1867-8, p. 702). It will be therefore seen that there were not a sufficient number of super-

visors to adopt this ordinance had the vote remained the same and had the mayor vetoed it (Record, p. 363).

*The legislative action of the board of supervisors prior to the ascertainment of the highest bidder was not sufficient to confer the franchise upon the highest bidder when ascertained.*

The only act of the board of supervisors in relation to the proposed franchise prior to the bidding was the passage of resolution No. 13231 (3d series), which was passed on November 18, 1895 (Record, p. 345). This resolution was a direction to the clerk to advertise for proposals for the sale of a franchise under the provisions of a *proposed* order. In other words, the board of supervisors invited bids for a franchise which it intended to grant by an ordinance subsequently to be passed. The ordinance which it proposed to thereafter adopt (but which it never did adopt), was embodied in resolution No. 13231.

The reasons which we have for saying that it was proposed to first ascertain the highest bidder and then to pass *an ordinance* are these:

(*a.*) Throughout resolution No. 13241, the ordinance which the board contemplated would be passed is styled a *proposed* order.

(*b.*) The proposed order has an enacting clause, to wit: "The people of the city and county of San Francisco do "ordain as follows:"

(*c.*) Section 11 provides that the grantee must accept the franchise within ten days from "the approval of this order." Approval plainly refers to the approval by the mayor mentioned in section 68 of the consolidation act. The word "approval" in this connection could have no other meaning. See Century Digest, vol. 36, col. 224, for various decisions upon the subject of approval of municipal ordinances.

(*d.*) The proposed order makes certain act misdemeanor, power which could not be exercised in the city and county of San Francisco except by an ordinance.

(*e.*) The proposed measure is called an *order*, which is the term which has been employed in San Francisco since 1856 to denote an ordinance.

These reasons, and others which might be stated, show that resolution No. 13231 was a mere invitation to the public to bid for a franchise which was to be conferred by an ordinance to be passed after the highest bidder was ascertained. *Consequently the municipal authorities did not determine in a legal way to grant the franchise by any action had prior to the opening of the bids.*

*The board of supervisors intended to pass order No. 2965 as an ordinance, and have the same approved by the mayor after publication, as required in section 68 of the consolidation act. This was never done, and hence the order was never adopted.*

Section 68 of the consolidation act requires every ordinance or resolution therein mentioned to be passed twice. Between its first passage and its last passage it must be published in a daily newspaper at least five consecutive days with the ayes and nays of its first passage. We believe that there is no general provision which requires any ordinance or resolution of the board of supervisors to be published, except that contained in section 68. (We speak, of course, of the state of the law before the present freeholders' charter of San Francisco went into effect for all purposes, which was in January, 1900.)

In view of these facts, it is very evident that when the board of supervisors adopted order No. 2965 on February 17, 1896 (Record, p. 363), they passed this order for the first time as required in section 68 of the consolidation act.

The order itself contained the provision that "the clerk is "hereby directed to advertise this order as required by law" (Record, p. 362).

The clerk, however, did not advertise it for the time required by law. Nor was the ordinance passed a second time as required by section 68. The reasons which we have already adduced show that it was the intention of the board of supervisors to adopt order No. 2965 *as an ordinance*, to have it published, to have it passed by the board of supervisors a second time, and to have it approved by the mayor. Why this was not done we do not know.

It will be therefore seen that the board contemplated that the ordinance would be put to final passage and ultimately be submitted to the mayor for his approval. In point of fact it never was put to final passage, nor submitted to the mayor, and it is the established law in California that under such circumstances the ordinance has no legal existence.

Eisenhuth *vs.* Ackerson, 105 Cal., 87.
Creighton *vs.* Manson, 27 Cal., 614, 630.
Spring Valley W. W. *vs.* Ashburn, 52 Cal., 126.
Pollock *vs.* San Diego, 118 Cal., 593.

In Eisenhuth *vs.* Ackerson, the validity of a street railroad franchise was involved which had been passed by ten members of the board of supervisors of the city and county of San Francisco. The franchise had been vetoed by the mayor, and his veto was subsequently sustained by a new board. The grantee of the franchise claimed that it was valid without the signature of the mayor, but the supreme court held that the ordinance was "an ordinance granting a privilege," in the sense of section 68 of the consolidation act, and required the approval of the mayor.

In the circuit court of appeals, counsel for appellee (respondent here) argued that the provision of section 68 of the consolidation act, requiring the approval of the mayor, had been repealed by implication by the act of April 25, 1863 (Statutes

1863, p. 540), entitled an "Act to confer *further powers* upon "the board of supervisors of the city and county of San "Francisco," by the use of the language in section 1 of said act that "the board of supervisors of city and county of "San Francisco shall have power *by regulation or order*." * * * "Second: To authorize and direct the summary "abatement of nuisances, to make all regulations which may "be necessary or expedient for the preservation of the pub- "lic health and the prevention of contagious diseases," etc.

"The court will observe" (says counsel in his brief in the court below) "that the act of 1863 confers this police power "on the board of supervisors and provides that they shall "exercise that power '*by regulation or order*.' Now, the "terms 'regulation or order' do not mean and cannot be "construed as being synonymous with either 'ordinance' "or 'resolution.' Section 68 of the consolidation act pro- "vides that 'every *ordinance* or *resolution* requiring certain "things to be done should be published and presented to "the mayor,' etc., but the police power given by the act of "1863 is given to the board of supervisors to be exercised "by '*regulation* or *order*.'"

This argument might have merit (1) if the use of the words "regulation or order" were new in the act of 1863, or if that act for the first time conferred "police powers" on the board of supervisors. But this is not true. The act of 1863 is an amendment of section 74 of the consolidation act. The original section 74 as passed contemporaneously with section 68, in 1856, in part, reads as follows:

> "SEC. 74. The board of supervisors shall further have power by *regulation or order*. * * *
>
> "Third. To provide by regulation for the prevention and *summary removal* of nuisances to public health, the prevention of contagious diseases, the prevention and summary removal of all nuisances and obstruction in the public streets and highways.
>
> "Fourth. To provide * * * for opening, alter-

ing, extending, planking, paving or repaving, or otherwise improving of public streets, etc.

"Fifth. Providing for lighting and cleaning the streets.

"Seventh. To provide for the erection, repair and regulation of wharves and docks, and fixing the rates of wharfage thereat.

"Eighth. To provide for improving of public grounds.

"Ninth. To prohibit the erection of wooden buildings within fixed limits, etc., etc."

Were all these acts to be performed under anything less than a solemn legislative act known as "ordinance" approved by the mayor?

Following the argument of counsel the circuit court of appeals decides against us the point that order No. 2965 requires the approval of the mayor in the following language (Record, p. 420).

"Order No. 2965 is claimed to be invalid because it was "not signed by the mayor *as required by the act of* 1893, and "in this connection it is claimed that the words found in the "statutes of California 'by regulation or order' are synony- "mous with the words elsewhere used 'ordinance and reso- "lution.' Admitting that these words may often be used to "express the same meaning, it does not necessarily follow "that in all cases the word 'order' is synonymous with 'or- "dinance,' or that the word 'resolution' is synonymous with "'regulation.' It is enough to say that by section 1 of the "act of 1863 the municipality was authorized to proceed "under the police power 'by order and regulation' to do the "things mentioned in order No. 2965 and order No. 12 (sec- "ond series).

"In People *vs.* Counts, 89 Cal., 15, 22, it was claimed tha "the board should have proceeded by ordinance and not by "order. The court said: 'Conceding that the county gov- "'ernment act for some purposes requires an ordinance, "'whilst for other purposes only an order is required, it is

"'only necessary in answer to this objection, to say that for "'the purposes under consideration section 37 of the act re-"'quires the board to do what it is thereby required to do "'"by order."'"

(The circuit court of appeals was in error in saying that we had claimed that the mayor's signature was made necessary by the act of 1893. Our claim was that it was made necessary by section 68 of the charter of San Francisco, commonly called the consolidation act.)

The court of appeals decides that the police powers of the city and county of San Francisco can be exercised by order or regulation, and that hence the provision that every ordinance and every resolution must receive the signature of the mayor does not apply to the exercise of the police power for the reason such powers may be exercised by order or regulation. In the city and county of San Francisco during a period of forty-three years the word "regulation" and the word "order," used in the consolidation act quoted by the circuit court of appeals, have been universally understood to mean "ordinance." In that time there were no ordinances (so called) passed by the common council of that municipality, but there were adopted during that time 3,398 orders and 50,953 resolutions. Among these are many orders and resolutions passed under the police power of the city, every one of which has received the approval of the mayor after having been published in accordance with the provision of section 68 of the consolidation act.

Section 74 of the original consolidation act passed in 1856, as we have shown above, confers on the board of supervisors not only police powers, but also power by *regulation or order* "to provide in cases omitted in this act, and in conformity with the principles adopted in it, for open-ing, altering, extending, grading, * * * or otherwise improving of public streets," etc.

Section 40 of the same act provides that the *board of supervisors*, when they deem it expedient, *may order* the whole or

any part of a street to be graded. The supreme court of California has decided in the case of Creighton *vs.* Manson (27 Cal., 613) that a resolution of the board of supervisors of the city and county of San Francisco of intention to grade a street must be presented to the president of the board for approval, and if not so presented is void, for the reason that the legislative department of the city can act only through the medium of an ordinance, which the court says may be in the form of a resolution.

We respectfully submit that if the words "regulation or order" mean "ordinance" when applied to street work they mean the same thing when applied to "the police powers," particularly when the application is made not only in the same act, but in the very same section of the same act.

The following cases, Federal and State, deal with ordinances of the city and county of San Francisco *involving the police powers*. An examination of these cases and of the records therein will show that every one of these ordinances received the approval of the mayor, and that every one of them was known as "Order No. —:"

Spring Valley W. W. *vs.* Bartlett, 16 Fed., 615.

Alpers *vs.* San Francisco, 32 Fed., 503.

*In re* Ah Toy, 45 Fed., 795.

Electrical Improvement Company *vs.* San Francisco, 45 Fed., 593.

Electrical Improvement Company *vs.* Scannel, 45 Fed., 596.

*In re* Ah Lung, 45 Fed., 684.

National Fertilizer Company *vs.* Lambert, 48 Fed., 458.

Sanitary Reduction Works *vs.* Cal. Reduction Co., 94 Fed., 693.

Home of Inebriates *vs.* San Francisco, 119 Cal., 534.

Academy of Sciences *vs.* San Francisco, 107 Cal., 334.

*Ex parte* Christensen, 85 Cal., 208.

Anderson's Law Dict., page 738.) The terms by-laws, ordinances and municipal regulations have substantially the same meaning, and are defined to be the laws of the corporate district made by the authorized body, in distinction from the general laws of the State."

We claim and insist that the consolidated act which requires every ordinance and every resolution upon enumerated subjects to receive the signature of the mayor is so comprehensive as to include every legislative act of which a municipal body is capable. It is established by an overwhelming array of authority that a municipal body cannot act in a legislative way except through the medium of an ordinance or a resolution. The terms "ordinance" and "resolution" have been repeatedly decided to include every species of legislative action of which a municipal corporation is capable.

The following cases decide that a municipal body cannot act in a legislative way except through the medium of an ordinance or a resolution. The terms "ordinance" and "resolution" therefore include both regulation and order:

Dey *vs.* The Mayor, &c., 19 N. J. E., 412, 416.
Moser *vs.* White, 29 Mich., 59, 60.
People of Alton *vs.* Mulledy, 21 Ill., 76, 78.
People *vs.* Schroder, 76 N. Y., 160, 162.
State *vs.* The City Council, 37 Atl., 675, 676.
Erwin *vs.* Jersey City, 37 Atl. (N. J.), 732, 734.
Schuman *vs.* Seymour, 24 N. J. Eq., 143, 153.
State *vs.* Darrow, 67 N. W. (Minn.), 1012, 1014.
Elliott's Elements of Municipal Corporations, p. 176.
Pollock *vs.* San Diego, 118 Cal., 593, 595.
McGavock *vs.* City of Omaha, 58 N. W. (Neb.), 543, 549.
Sower *vs.* Philadelphia, 35 Pa., 231, 236.
City of Crawfordsville *vs.* Braden, 130 Ind., 149; 30 Am. St. Rep., 214, 224.
Creighton *vs.* Manson, 27 Cal., 614, 629.

Chicago, &c., R. R. Co., *vs.* Chicago, 51 N. E. (Ill.), 596, 598.

City of Alma *vs.* Guaranty Savings Bank, 60 Fed., 203, 206.

The corner stone of the decision of the United States circuit court of appeals seems to be the case of People *vs.* Counts, 89 Cal., 15, 22. We shall now proceed to show that that case is not an authority in point. That case arose under the county government act of 1883 (Stats. 1883, p. 299), which provides:

> "SEC. 37. The supervisors can only contract a bonded indebtedness other than such as is authorized by section twenty-six (misprint for thirty-six) of this act, as follows:
>
> "They shall, *by order*, specify the particular purpose for which the indebtedness is to be created, and the amount of the bonds which they propose to issue, *and shall* further provide for submitting the question of the issue of said bonds to the qualified electors, etc., notice of which election shall be published for four weeks."

Under this section the supervisors of Mariposa county made an order calling an election for the purpose of submitting the issuance of certain bonds to the people. The bonds were subsequently issued, and to test their validity an original application was made to the supreme court of California for a writ of mandate to the treasurer of the county commanding him to sell the bonds.

As against their validity, it was claimed that the board should have proceeded by *ordinance*, and not by *order*. In holding against this contention, the court used the language quoted by the circuit court of appeals, namely:

> "Conceding that the county government act for some purposes requires an ordinance, whilst for other purposes only an order is required, it is only necessary to say that for the purposes under consideration section 37 of the act requires the board to do what it is thereby required to do 'by order.'"

This case fails as an authority here for a number of reasons:

(1.) The county government act recognizes a plain distinction between an "ordinance" and "an order," as will be seen by reading section 26 of the act, which is in the following words:

> "SEC. 26. The enacting clause of all ordinances of the board shall be as follows: 'The board of supervisors of the county of —— do ordain as follows.' Every ordinance shall be signed by the chairman of the board and attested by the clerk. On the passage of all ordinances the votes of the several members of the board shall be entered on the minutes, and all ordinances shall be entered on the 'Ordinance Book.' No ordinance passed by the board shall take effect within less than fifteen days after its passage, and before the expiration of the said fifteen days the same shall be published, with the names of the members voting for and against the same, for at least one week in some newspaper published in the county, if there be one, and if there be none published in the county, then such ordinance shall be posted at the court house door at least one week. *An order* entered in the minutes of the board that such ordinance has been duly published or posted, shall be *prima facie* proof of such publication or posting."

It is plain from the foregoing section that an "ordinance" under this act is an act which must

(1) be signed by the chairman, and

(2) attested by the clerk; and

(3) votes thereon must be entered in the minutes, and

(4) entered on the "Ordinance Book," and

(5) published or posted for one week after its passage. But an "order" is simply entered in the minutes of the board.

The word "order," no doubt, was advisably used in section 37, for that section provides that such order shall be

published for four (4) weeks, and the publication of one week required for ordinances became unnecessary.

(2) There is a plain distinction between a county and a city or a city and county in California. A county is a political subdivision, a governmental agency of the State, while a city or a city and county is a municipal corporation or body politic. A county has no charter or fundamental law by which it is controlled in its legislative action. If the legislature says it shall act "by order," it has no mode of procedure to consult except that directly indicated by the legislature. It has no mayor to approve or veto its ordinances. Another distinction is that the powers of the county are directly conferred by the legislature irrespective of the will of the inhabitants thereof, whereas the inhabitants of a city are authorized to determine whether they will accept the corporate powers offered them, to be exercised by officers of their own selection.

Kahn *vs.* Sutro, 114 Cal., 316.

The ordinance, resolution, regulation, or order of a city is, therefore, a different matter than an ordinance or order of a county. The one is a corporate act, the other the act of a governmental agency. The city and county of San Francisco, under the constitution and consolidation act, is a municipal corporation possessing certain governmental functions derived from the county government act. But the board of supervisors authorized by the consolidation act are not the same body authorized by the county government act, although they bear the same name (Kahn *vs.* Sutro, 114 Cal., 316). When the board of supervisors acted in regard to the ordinance here involved, they acted in their capacity as municipal officers, and not as county officers. They acted under the charter, and not under the county government act, and therefore the case of People *vs.* Counts is no test of the sufficiency of their action in the case at bar.

In addition to the distinction indicated in the county gov-

ernment between the meaning of the words "ordinance" and "order," as used in that act, the county government act, if it applied to the city of San Francisco, would present one of the strongest instances of repeal by implication. The veto power is conferred for the benefit of the people, that they may have the judgment of the executive on matters of legislation; but why have his judgment on matters which are specially referred to the judgment of the people themselves? The veto power of the mayor in such instance would be utterly repugnant. (See the opinion of the United States circuit court of appeals of the eighth circuit in City of Alma *vs.* Guaranty Sav. Bank, 60 Fed., 203.

REPEAL BY IMPLICATION NOT FAVORED.

This rule is laid down in Bowen *vs.* Lease, 5 Hill, 221, in the following language:

"The inevitable rule of construction, in respect to the repealing of statutes by implication is, that the earlier act remains in force, unless the two are manifestly inconsistent with and repugnant to each other, or unless some express notice is taken of the former, plainly indicating an intention to abrogate it."

The rule laid down is approved by the supreme court of the State of California in

Perry *vs.* Ames, 26 Cal., 382;
People *vs.* Platt, 67 Cal., 21; and also
*In re* Mitchell, 120 Cal., 384.

The provision of section 68 of the consolidation act is intended for the protection of the city by giving it the benefit of the judgment of the mayor, whose veto message is published (Cons. Act., sec. 68). Such a provision of a city charter will not be deemed to have been repealed except by a statute expressly repealing the same or doing so by the strongest implication.

There is no repealing clause in the acts of 1863 and 1893, so that presumably no repeal was intended. Repugnancy must be clear, and this is peculiarly true in the case of local legislation when said to be repealed by general statutes. Such repeal does not take place except upon the most unequivocal manifestation of intent to that effect.

Banks *vs.* Yolo County, 104 Cal., 258.
Cooley, Con. Lim., 6th edition, 182.
Malone *vs.* Bosch, 104 Cal., 680.

When two statutes treat of the same subject, one general and the other special, unless they are irrevocably inconsistent, the general law, though later, will not repeal the special. The special law will prevail so far as the subject-matter comes within its provisions.

Bateman *vs.* Colgan, 111 Cal., 581.
Loupe *vs.* Smith, 123 Cal., 491.

The latter case held that:

> "So long as a definite and intelligible scheme is left, deduced by reading the two sections together, one does not efface the other."

The two laws must be so construed as to maintain the integrity of both, and the repugnancy between them should be very clear to sustain a repeal by implication.

People *vs.* Pacific Improvement Co., 130 Cal., 442.

For examples of repeal by implication, see
McDonald *vs.* Dodge, 79 Cal., 112.
Brooks *vs.* Fischer, 79 Cal., 173.

The foregoing discussion, in so far as it bears on the question of the repeal of the veto power of the mayor, applies equally to the act of 1863 and to the franchise act of 1893. But it must be borne in mind that in regarding the ordinance here involved as a contract under the police power,

the act of 1893 must be eliminated as having nothing to do with its passage.

(*b.*) *Considered as a franchise under the act of March 23, 1893 (Stats. Cal. 1893, p. 288), the granting thereof involved the exercise of legislative power by the municipality and required the approval of the mayor.*

In People *vs.* Board of Supervisors of Contra Costa County (improperly entitled "People *vs.* Dean"), 122 Cal., 421–423, the court says:

> "It has been decided by this court that the granting of a franchise was a legislative act. This has been decided in a long, unbroken line of cases, beginning with Chard *vs.* Harrison, 7 Cal., 113, and ending with Quinchard *vs.* Board of Supervisors, 113 Cal., 664."

And again:

> "That such a grant is *essentially* and *entirely* legislative cannot be questioned."

In South Pasadena *vs.* Terminal R'y Co., 109 Cal., 315, it is decided, to quote from the syllabus:

> "The authority of city officers to grant the use of streets for railways is legislative in its nature and is not referable for its support to the power of making contracts."

In Quinchard *vs.* Board of Trustees, 113 Cal., 664–669, it is said:

> "The functions exercised by a municipal corporation may be legislative, administrative, or judicial, but only the acts done by it 'when exercising judicial functions' can be reviewed under this procedure. 'This writ does not lie under the laws to review the action of any tribunal, board or officer in the exercise of functions which are legislative in their character' (People *vs.* Oakland Board of Education, 54

Cal., 375). Whether an existing street shall be improved is a question to be addressed to the governing body of a municipality in its legislative capacity, and its determination upon that question, as well as upon the character of the improvement to be made, is a legislative act (Dillon on Municipal Corporations, secs. 94, 927; Creighton *vs.* Manson, 27 Cal., 613; DeWitt *vs.* Duncan, 46 Cal., 343; Bolton *vs.* Gilleran, 105 Cal., 244; 45 Am. St. Rep., 33). The act does not cease to be legislative because the members of the city council are required to exercise their judgment in determining whether the improvement shall be made. The judgment which they exercise in ordering the improvement is not a determination of the rights of an individual under existing laws, but is the conclusion or opinion which they form in the exercise of the discretionary power that has been intrusted to them, and upon a consideration of the public welfare and demands for which they are to provide. This discretion and opinion is a part of the legislative power that has been conferred upon the city, and is of the same character as that exercised by the legislature itself in providing for the general welfare of the State, and is equally independent of supervision by the judiciary."

It is expressly decided in the following cases that granting franchises involves the exercise of legislative power:

Chard *vs.* Harrison, 7 Cal., 113.

Fall *vs.* Sutter Co., 21 Cal., 236.

California State Tel. Co. *vs.* Atlantic Tel. Co., 22 Cal., 398.

T. & T. T. R. R. Co. *vs.* Campbell, 44 Cal., 89.

San Francisco *vs.* Spring Valley W. W. 48 Cal., 493.

Spring Valley W. W. *vs.* Bryant, 52 Cal., 132.

*The granting of a franchise except by legislative action, direct or indirect, would be a legal impossibility, furthermore, any scheme for the granting of a franchise which did not involve*

*the exercise of legislative discretion of one character or another, would be unconstitutional.*

Brandenstein vs. Hoke, 101 Cal., 131, 134.
Moulton vs. Parks, 64 Cal., 166.
People vs. Bennett, 29 Mich., 451.

In sustaining order 2965 as a franchise, under the act of 1893, the circuit court seems to have overlooked the fact that the granting of a franchise involves legislative power and legislative discretion, and seems to have proceeded upon the theory that that act provided a mode or manner of procedure for granting franchises instead of mere conditions on which they might be granted. The court seems to have lost sight of the fact that the legislative body of a municipality might either determine not to grant the franchise or to grant it, and if it determines to grant the franchise it must proceed in the manner peculiar to its charter provisions.

In its opinion upon the motion for a preliminary injunction, the circuit court (Record, pp. 88 to 96) decided that the provision requiring the signature of the mayor did not apply to the franchises granted under the act of 1893. This decision was based upon the authority of People vs. Board of Supervisors, 122 Cal., 421, wherein it was decided that a franchise for a wharf should have been granted in conformity to the act of 1893. *The case cited, however, has no application to the point here involved.* The purpose of the act of 1893 was to simply require all franchises to be sold, and was intended to prohibit their transfer upon gratuity. The very case cited by the circuit court, People vs. Board of Supervisors, 122 Cal., 421, 423, declares that "it has been decided by this court that the grant of a franchise was a legislative act." The franchise act of 1893 provides that "every franchise or privilege * * * proposed to be granted by the board of supervisors, common council or other governing or legislative body * * * shall be granted upon the condition in this act provided, and not otherwise."

Provision is thereupon made requiring the fact to be stated "that an application for such franchise or privilege has been made," and "that it is proposed to grant the same." Thereupon procedure is provided for the opening of bids and the striking off of the franchise to the highest bidder. The point in the procedure where the legislative power of the common council is called into play is when the common council determines to grant a franchise and give notice of the proposed sale. This it must do before the publication occurs, for the publication is required to state "the fact that an application for such franchise or privilege has been made" and that "it is proposed to grant the same."

It is obvious, therefore, that the board is required to determine that it will grant the franchise to the highest bidder. This action is required by the charter of San Francisco to be submitted to the mayor for his approval or rejection. There is therefore no theory upon which it can be decided that the act of 1893, which was intended simply for the purpose of securing the sale of franchises, had the effect of repealing a provision of the municipal charter (that requiring the signature of the mayor) which was intended to safeguard the interests of the municipality and the inhabitants thereof.

It is clear that before the board of supervisors can strike off a franchise to the highest bidder under the act of 1893 they must take preliminary action in determining "that it is proposed to grant the same," and directing publication of notice for bids. The act is silent as to the mode or manner in which this preliminary action shall be taken. The board must therefore proceed in the only mode in which it can proceed in the absence of specific statutory direction, namely, by ordinance under section 68 of the consolidation act. It must be borne in mind that the act of 1893 is a general law, and as such an amendment to the charter of San Francisco and to the charter of every municipality in California. The object of the act was simply to impose the condition that

franchises should thereafter be sold and not granted as a gratuity, and it was wise, therefore, not to interfere with the mode of legislative procedure of most or all of the municipalities in the State, but to leave them to their charter provisions.

We contend that the ordinance required to be adopted by the board of supervisors of San Francisco under the franchise act of 1893, declaring that *they propose to grant the franchise*, and *directing advertisement of such fact and the day on which tenders will be received for the same*, is entirely analogous to the ordinance required under the street improvement law of California as contained in the original consolidation act of 1856 (Stats. of Cal. 1856, p. 156, sec. 40), declaring their intention to do certain work and directing publication thereof for ten days. "The declaration of intention is the fundamental act of the whole proceeding to grade the street," says the supreme court of California in Creighton vs. Manson, 27 Cal., 613–629.

In this case the court held that this must be done by ordinance approved by the mayor, and this was the law until the legislature, in 1862, amended the street law by declaring that the ordinances or resolutions passed under that law (street law of 1862) should not be deemed to be "such ordinances or resolutions as are mentioned in section 68 of the consolidation act (Stats. of Cal. 1862, p. 391, sec. 3).

We submit, therefore, that either as a franchise under the act of 1893 or as a contract under the police power the order of the board of supervisors here involved is void for want of approval by the mayor. *Regarded as a contract under the police power*, the act of 1893 has nothing to do with its passage, and it is void for want of approval by the mayor under section 68 of the consolidation act, because—

(1) it grants a privilege—the exclusive right to cremate all garbage produced in San Francisco;

(2) it imposed a new duty—the duty of every producer of garbage in the municipality to deliver the same to the cre

matory and pay twenty cents per cubic yard for its incineration; and

(3) it imposed a penalty in making the violation of the order a misdemeanor.

Regarded as a franchise under the act of 1893, it is void, because it was not passed as an ordinance or resolution in conformity with section 68 of the consolidation act and did not receive the approval of the mayor.

A case in point is Eisenhuth *vs.* Ackerson, 105 Cal., 87.

This case involved the validity of a street railroad franchise which had been passed by ten members of the board of supervisors of the city and county of San Francisco. The franchise had been vetoed by the mayor, and his veto was subsequently sustained by a new board. The grantee of the franchise claimed that it was valid without the signature of the mayor, but the supreme court of California held that the ordinance was an "ordinance granting a privilege" in the sense of section 68 of the consolidation act and required the approval of the mayor.

The case of Eisenhuth *vs.* Ackerson, we contend, is of controlling force here. The court says:

(Page 92:)

> "The principal point made by counsel for appellant, however, is founded upon section 497 of the Civil Code, under which they say the grant of the franchise in question was made, and which they claim to be so inconsistent with the power of the mayor to veto such grant as to repeal, by implication, that part of section 68 of the consolidation act which authorizes him to veto all ordinances and resolutions of the board providing 'for the granting of any privilege.'
>
> "Section 497 of the Civil Code is the first section of title IV, part IV, division 1, headed, 'Street railroad corporations,' and reads as follows: 'Authority to lay railroad tracks through the streets and public highways of any incorporated city or town may be obtained for a term of years, not exceeding fifty,

from the trustees, council, or other body to whom is intrusted the government of the city or town, under such restrictions and limitations, and upon such terms and payment of license tax, as the city or town authority may provide. In no case must permission be granted to propel cars upon such tracks otherwise than by horses, mules, or by wire ropes running under the streets and moved by stationary steam-engines, unless for special reasons, as hereinafter provided.'

"But we perceive nothing in this section or in title IV at all inconsistent with any part of section 68 of the consolidation act, since neither section 497 nor any other part of title IV purports to provide or regulate the mode or manner in which the 'authority' to lay street railroad tracks in the streets of incorporated cities or towns shall or may be granted by the 'trustees, council, or other body to whom is intrusted the government of the city or town.' *The sole object of title IV was to authorize the governing bodies of incorporated cities and towns to grant the privilege of laying street railroads under such restrictions and limitations as are specified in that title. There was no necessity for providing the mode or manner of the grant, so long as the legislature was content with the modes already provided by the charters of the different cities and towns in the State, although the governing bodies of such cities and towns were differently constituted and governed by charters prescribing different modes of municipal legislation.* Any authorized mode of granting the privilege of constructing and operating street railroads, fully answered all purposes of the Code provisions cited, without requiring all municipalities to grant that privilege in a uniform mode. If, as contended by counsel, section 497 of the Civil Code cannot operate uniformly on all municipal corporations without uniformity in the manner of passing ordinances granting the particular privilege for which it provides, then, indeed, is that section itself unconstitutional, since it fails to provide for such uniformity of manner and leaves it to be governed by the charters of the different municipalities, whose modes of legislation are far from uniform in this respect. But we think that section is not wanting in uniformity of operation on the governing

bodies of all incorporated cities and towns in the State; which governing bodies, however constituted, it authorizes to grant the privilege of constructing street railroads, without prescribing the manner in which the grant shall be made; and it does not purport to have any other operation or effect. For the purposes, and to the full extent of thus authorizing such governing bodies to grant street railroad franchises, section 497 of the Civil Code is a general law, and, by implication, repeals all prior laws inconsistent therewith; but, as above remarked, section 68 of the consolidation act is in no respect inconsistent therewith."

*Order No. 12.*

In the circuit court of appeals the appellee (respondent here) claimed that order No. 12 (Record, p. 329) operated as confirmation and ratification of order No. 2965, and validated the same.

It is, therefore, advisable that we should state our position with respect to this ordinance, namely, order No. 12. The positions which we take in the matter are three:

(a.) The reference in order No. 12 to order No. 2965 is a mere reference to the latter order as one already passed, and the passage of which is treated as an antecedent act properly done. Consequently the reference would not amount to an enactment of the earlier ordinance.

(b.) Order No. 12 is manifestly dependent upon the supposed existence of order No. 2965. If order 2965 has no existence, order No. 12 falls as being dependent upon a non-existing ordinance.

(c.) Order No. 12 is penal in character. The respondent has no *proprietary* interest therein and is not entitled to enforce its provisions in equity, and, finally, order No. 12 is unilateral and not bilateral in character and created no contractual rights between the municipality and the respondent.

*The reference in order No. 12 to order No. 2985 is a mere reference to the latter order as one already passed, and the passage of which is treated as an antecedent act properly done, consequently the reference would not amount to an enactment of the earlier ordinance.*

It is the established law of California that if a later ordinance incorrectly recites the existence and passage of a prior ordinance, that the later ordinance will not have the effect of giving validity to the earlier ordinance.

This question arose in 1857. December 5, 1853, ordinance No. 481 of the city of San Francisco was passed to provide for the sale of certain city property. It turned out, however, that ordinance No. 481 did not receive the necessary votes, and while it was generally believed to have been passed, in point of law it had not been passed at all. December 26, 1853, was the day for the sale of the lots under ordinance No. 481. On that day and about an hour before the sale occurred ordinance No. 493 was duly and regularly enacted. The last mentioned ordinance referred to ordinance No. 481 and to the proposed sale which was to occur thereunder and appropriated the proceeds of said sale to certain municipal purposes. Holland, the plaintiff in Holland *vs.* San Francisco, 7 Cal., 384, brought an action against the municipality to recover the money she had paid to it on account of real estate purchased by her. In that case it was decided that ordinance No. 493 was a sufficient recognition of ordinance No. 481 to render the sale valid and binding. From this decision Chief Justice Murray dissented.

The case of Holland *vs.* San Francisco, however, was expressly overruled in McCracken *vs.* San Francisco, 16 Cal. 621.

The doctrine announced in McCracken *vs.* San Francisco was upheld and followed in later decisions.

Grogan *vs.* San Francisco, 18 Cal., 610.
Pimental *vs.* San Francisco, 21 Cal., 353.
Herzo *vs.* San Francisco, 33 Cal., 134.

## IV.

CONSIDERED AS A FRANCHISE, THE ORDINANCE IS INVALID FOR WANT OF POWER TO GRANT THE FRANCHISE AND FOR A VIOLATION OF THE PRESCRIBED MODE IN THE GRANTING THEREOF, IF THERE WERE POWER TO GRANT THE SAME.

(*a.*) There is no law of California under which the ordinance here involved, considered as a franchise, could have been lawfully granted. The ordinance itself purports to have been granted solely under the authority contained in the franchise act of 1893 (Stats. Cal. 1893, p. 298) hereinabove set out in full.

The act of 1893 does not pretend to authorize the granting of franchises. Its obvious purpose is to put a limitation upon the exercise of power to grant franchises conferred by other acts. The language is that "every franchise * * * hereafter proposed to be granted * * * shall be granted upon the conditions in this act provided, and not otherwise." The conditions provided in the act are those of purchase and sale. In other words, no franchise can be voted as a gratuity. It must be sold, and sold to the highest bidder. The plain object of this statute was to limit the exercise of authority to grant franchises conferred by other acts of the legislature. It was never intended to be itself a grant of authority to vote franchises. It was an act limiting power conferred by other legislation.

It is therefore clear that, considered as a franchise, there is no authority whatever for the passage of the ordinance here involved.

(*b.*) Assuming, however, that the act of 1893 does authorize the granting of such a franchise, there is no provision therein, nor is there any provision elsewhere to be found, which authorizes the granting of an *exclusive* franchise. It

is clear that authority to grant a franchise never carries with it power to grant an exclusive franchise.

Minturn *vs.* La Rue, 23 How., U. S., 435.

Citizens' Street Railway *vs.* Detroit Railway, 171 U. S., 48.

(c.) The grant of the franchise was invalid for the reason that it was not sold to the highest bidder, as required by the act of March 23, 1893. Merle bid $5,500 (Respondent's Ex's 5 and 30, Record, p. 350). Sharon bid $2,510 and a percentage of the gross receipts (Respondent's Ex's 6 and 29, Record, p. 352). Merle was the highest cash bidder. The board of supervisors awarded the franchise to Sharon on the theory that his bid of a percentage of the gross receipts made him the highest bidder. This award was made February 17, 1896. A month later, March 17, 1896, the supreme court of California decided (Thompson *vs.* Board of Supervisors, 111 Cal., 553) that percentage bids were invalid, and that the statute required the award to be made to the highest cash bidder. The award to Sharon was therefore void. Mode is the measure of power (Pacific Electric Company *vs.* The City of Los Angeles, 118 Fed., 746, 753, affirmed in this court April 11, 1904).

It is also clear that this point is open to us, for it is said in City of Zanesville *vs.* Zanesville Gas Light Company, 47 Ohio, 1; 23 N. E., 25, to quote from the syllabus:

> "*Wherever an incorporated company in any action asserts a right against another person, based upon an assumed franchise or power, the person against whom the right is so asserted may, as a defense, deny the existence of such franchise or power.*"

This same rule is laid down in Thompson on Corporations, sections 5340.

In Waterloo Turnpike Road Co. *vs.* Cole, 51 Cal., 386, it is said:

"But in the case at bar the point raised by the defendant is, that it affirmatively appears, from the plaintiff's evidence, that the board did not acquire jurisdiction to grant the franchise to collect tolls because of its failure to prescribe the location of gates, which was a condition precedent to the exercise of the power to grant the franchise. In other words, the proposition is, that the grant is void for want of jurisdiction in the board to make it, and not merely that the board erred in the exercise of its admitted jurisdiction. The distinction between the two cases is obvious; and it is too clear to require argument, that when the want of jurisdiction appears upon the face of the proceedings, as in this case, any one injuriously affected may avail himself of the defect, even in a collateral action."

We therefore submit that, whether it be considered as a contract under the police power or as the grant of a franchise, the ordinance here involved never had any legal existence, for the reason that it was never lawfully enacted.

## V.

SOCIALISM HAS NOT BECOME SO DOMINANT A PRINCIPLE IN THE POLICE POWER THAT THE STATE CAN ASSUME OR FARM OUT A MONOPOLY OF ALL OF THE OCCUPATIONS SUBJECT TO REGULATION UNDER THE POLICE POWER.

In Iler *vs.* Ross (Neb.), 90 N. W., 961; 57 L. R. A., 895, it is decided that "scavenger work has a well accepted and defined meaning, and the occupation or business, lowly though it be, has existed and has been recognized and regulated for ages."

The proposition upon which this case was sustained in the circuit court of appeals is that the State may assume a monopoly of the occupation of collecting and destroying

house refuse, and may, therefore, farm out that monopoly to "an agent of the State." This is laid down with respect to a calling which, though lowly, is an incident to civilized life in all large cities—to a calling which engages the activities and brings a livelihood to great numbers of persons. The calling is on a plane with tanning, carpet-beating, the manufacture of soap, laundering, and other similar occupations. If the State (or a political subdivision) can assume or farm out a monopoly of the occupation of collecting and destroying refuse, upon what theory can it be denied the right to assume or farm out a monopoly of tanning, manufacturing soap, carpet-beating, laundering, and other similar occupations?

Is it possible that the police power of the State has grown so great that it now embraces authority to accomplish all these results?

We claim not.

In Lawton *vs.* Steele, 152 U. S., 133, it is decided that to justify the exercise of the police power the public interest must require the interference, and *the measures adopted must be reasonably necessary for the accomplishment of the* purpose.

In Allgeyer *vs.* Louisiana, 165 U. S., 578–589, it is held that "the right to follow any of the common occupations of life is an inalienable right."

The ordinance here involved violates, so we claim, the principles laid down in the cases cited.

We know of no case decided by this court where the authority of a State to assume or farm out a monopoly of a calling confessedly subject to police regulation has ever been considered. The case at bar sustains the exercise of such power by a municipality which has been granted no special powers upon these subjects. The decision of the circuit court of appeals therefore practically establishes that such a power exists in every municipality of the country.

Whether such an application of the police power shall

become imbedded in the jurisprudence of the country is in the hands of this court.

Respectfully submitted.

GARRET W. MCENERNEY,
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# APPENDIX.

## Order No. 2965.

Granting to F. E. Sharon, his associates and assigns, the sole right and privilege to cremate garbage, house refuse, dead animals and putrid vegetable matter and material of a like character, as well as to dispose of the same by some process of reduction equally effective and unobjectionable, and to convert the same, or a portion thereof, into fertilizing matter and other substances, free of all cost or charge to said city and county, and making certain violations of this order misdemeanors.

Whereas, the disposal of house refuse, butchers' offal, garbage, putrid or stinking animal or vegetable matter, refuse, ashes, or other like matter, by cremation, or by some process of chemical reduction, is the only effective means to dispose of the same to prevent the said matter and material from being deposited in or upon lots, lands and public streets situate in the city and county or in the waters of the bay, as heretofore, to the prejudice of the public health; and

Whereas, under the provisions of an act of the legislature entitled "An act providing for the sale of railroad and other franchises in municipalities, and relative to granting of

franchises" (approved March 23, 1893), bids for a franchise were duly called for; and

Whereas, F. E. Sharon was the highest and best bidder for the said franchise, as hereinafter recited, and all the forms and requirements of law necessary thereto being complied with; now, therefore,

The people of the city and county of San Francisco do ordain as follows:

In consideration of the sum of twenty-five hundred and ten dollars, the receipt of which is hereby acknowledged, and in consideration of the further payment of two per centum for the term of fifteen years from and after the date of this franchise, and the payment of five per centum for the remaining term of thirty-five years, on the gross amount of the receipts to be derived by the said F. E. Sharon, his associates or assigns, under this franchise, to be paid into the treasury of the city and county of San Francisco each and every year during the continuance of this franchise, the franchise hereinafter recited is hereby granted to F. E. Sharon, his associates and assigns.

SECTION 1. The sole and exclusive right and privilege is hereby conferred upon and granted to F. E. Sharon, his associates and assigns, for a term of fifty years from and after the approval of this order, to cremate and destroy within the city and county aforesaid, by crematories or by a process of reduction, house refuse, butchers' offal, garbage, refuse, dirt, ashes, cinders, sludge, crockery, tins, bones and other like matter, and any dead animals (not otherwise provided for by contract or franchise heretofore granted), and putrid vegetable matter, and fish, flesh and food condemned by the board of health of said city and county as unfit for human food, and the said grantees, their associates and assigns, shall have the right and privilege to charge and collect therefor not exceeding the sum of twenty cents per load such load not to exceed a cubic yard, on the delivery of the above material or substances at the plant or works where the crematory or reduction plant is established.

SECTION 2. The grantees, their associates and assigns, shall within a period of twenty-four (24) months after the granting of this franchise, unless the time is extended therefor by this board, have fully erected and constructed and in operation a suitable building or buildings, and equip, fit up and install the same with the necessary crematories machinery,

tools and appliances required to cremate and destroy by cremation, or by a process of reduction, all obnoxious germs and elements contained in house refuse, butchers' offal, garbage, refuse, dirt, ashes, sludge, crockery, tins, cinders, bones and other like matter, and any dead animal and putrid vegetable matter, and fish, flesh and food condemned by the board of health as unfit for human food, the works to be constructed to cremate or reduce at least three hundred tons per day of the materials specified in this section, and the capacity to be increased as required from time to time.

SECTION 3. From and after the erection and construction of the buildings referred to in section 2 of this order it shall be unlawful for any person or corporation to remove through the public streets from any houses, hotels, markets, hospitals, factories, restaurants, stores or any other like building or place in the city and county, any refuse, butchers' offal, garbage, dirt, ashes, cinders, sludge, crockery, tins, bones or other like matter, or any putrid animal or vegetable matter, or any fish, flesh or food condemned by the board of health as unfit for human food, or dead animals whose removal is not otherwise provided for by contract or franchise heretofore granted, unless the same shall be removed through said public streets in closed vehicles and wagons constructed so as to conceal the contents from public view, and to effectually prevent any smell escaping therefrom, as well as to prevent the droppings of any portion of such material or substances on or upon the public streets, and which said vehicles and wagons shall be constructed in accordance with specifications approved by the board of health of said city and county.

SECTION 4. From and after the erection and construction of the buildings referred to in section 2 of this order it shall be unlawful for any person or corporation to dump or place upon any land within said city and county, or in any water or waterways within said city and county, any refuse, butchers' offal, garbage or other material mentioned in section 3 of this order, but such refuse, butchers' offal, garbage and other material shall be forthwith delivered to the crematory herein provided for, and there, at the expense of the person or corporation so conveying the same, be cremated or destroyed, or subjected to such disposition and treatment as will at once secure and effect a complete combustion of all gases and odors arising therefrom.

SECTION 5. The said grantees, their associates and assigns, on receipt of any of the material or substances specified in this order, shall within twenty-four (24) hours thereafter cremate or reduce the same, or shall subject the same to such process as will secure the complete combustion of all gases or odors arising therefrom. The said grantees, their associates and assigns, shall maintain and operate their plant and crematory or crematories, or other apparatus, and the matter and substances received, so as to prevent any obnoxious smells or gases being emitted either from the deposit of such matter or substances on their premises, or from the process of cremation or other treatment thereof, or from the residuum remaining after cremation or treatment as aforesaid; also, that in the operation of said works no smoke or soot shall be emitted so as to constitute a nuisance.

SECTION 6. The said grantees, their associates and assigns, shall from and after the first day of December, 1902, have the sole and exclusive right and privilege during the continuance of the remainder of the term of this franchise to remove and dispose of the carcasses of all dogs killed at the public pound, and all animals impounded and not redeemed by the owners thereof, and which are valueless and cannot be sold; also, to remove and dispose of the carcasses of all dead animals found upon the public streets, and the carcasses of all dead animals in said city and county not slain for human food, which shall not be removed and disposed of by the owners thereof so as not to become a nuisance within six hours after the death of the same; provided that in the event the parties now holding and exercising this privilege of removing the dead animals not slain for human food should hereafter fail or refuse to remove the dead animals and should forfeit their contract with said city and county, then immediately upon such forfeiture the right to remove said dead animals shall vest in the grantees herein, their associates and assigns under this order.

SECTION 7. This board will pass such orders as may be required from time to time to enable the said grantees, their associates and assigns, to enjoy and have the benefit of all the rights and privileges herein granted, and on the completion of the work will pass such other and additional orders as will enable the said grantees, their associates and assigns, to carry out the contemplated destruction of garbage, offal, house refuse and material mentioned in this order and

the conversion of the substances herein named for fertilizing and other purposes, and for the segregation prior to delivery of garbage and offal from ashes and other refuse.

SECTION 8. The said grantees, their associates and assigns, shall at all times be subject to and conform to all health and sanitary regulations and requirements enacted and in force during the existence of this franchise. The said grantees, their associates and assigns shall receive no compensation whatever from the city and county for any service performed under the conditions of this order in disposing of the material and substances specified in this order.

SECTION 9. This franchise shall cease and determine upon the failure of the grantees, their associates and assigns, to fully carry out and faithfully perform the obligations herein imposed, unless from unavoidable cause beyond the control or power of the grantees, their associates and assigns, by reason of any fire or other casualty, the operations and works shall be destroyed or temporarily suspended in their operation. The said grantees, their associates and assigns, in the event of an accident to or destruction of their works, shall, during the time such works cannot be operated, and until said works are repaired or reconstructed, and within such reasonable time as may be allowed and approved by this board, deodorize the material and substances specified in this order and dispose of the same as directed by this board, so as to prevent all noxious gases or odors escaping therefrom, until the said material or substances are cremated or utilized as provided by this order.

SECTION 10. All of the machinery and appliances used shall be of California manufacture, except such as are manufactured exclusively or patented in the eastern States or abroad.

SECTION 11. The said grantees, their associates and assigns, shall, within a period of ten days from the date of the approval of this order, file with the clerk of this board their acceptance of its provisions and of this franchise.

SECTION 12. Any violation of the provisions of sections 3 and 4 of this order shall be and are hereby declared to be a misdemeanor, and punishable as such.

SECTION 13. This order shall take effect and be in force on and from its passage.

All orders or parts of orders in conflict with the provisions of this order are hereby repealed and made null and void.

And the clerk is hereby directed to advertise this order as required by law.

In board of supervisors, San Francisco, February 17, 1868.
Adopted by the following vote:
Ayes—Supervisors King, Scully, Hirsch, Dimond, Taylor, Morganstern, Spreckels, Hobbs.
Noes—Supervisors Benjamin, Hughes, Dunker, Wagner.

JNO. A. RUSSELL, *Clerk.*